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NO. 76-678

In The Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Mary T. Matthies
KOTHE, NICHOLS & WOLFE, INC.
124 East Fourth Street
Tulsa, Oklahoma 74103
Attorneys for Petitioner

Of Counsel:
Brynn F. Aurelius
P.O. Box 2463
Houston, Texas 77001

TYPE SERVICE CO., LAW BRIEF PRINTING DIVISION, 507 S. Quaker, Tulsa, OK. 74120 (918) 587-2052

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I. NEW ISSUES PRESENTED

There were several new issues presented by the Respondent, Mrs. Dartt, which Shell Oil Company believes warrant reply, as well as several new decisions and recent legislative developments which Shell believes should be

brought to the attention of this Court. The new issues are:

A. Whether this Court should reject the new issue raised by Mrs. Dartt as to the effective date of her termination.

B. Whether the mere receipt and processing by the Labor Department of the oral complaint by Mrs. Dartt failed to satisfy either the notice or conciliation requirements of Section 626(d).

C. Whether, contrary to the assertions by Mrs. Dartt, the District Court considered equitable factors in reaching its decision.

II. PERTINENT ADDITIONAL FACTS

In her brief, Mrs. Dartt asserts that her initial oral complaint was sufficient to satisfy the notice and conciliation purposes of Section 626(d). Mrs. Dartt asserts that the notice requirements of Section 626(d) were fulfilled when she registered her complaint, because this complaint allowed both the Labor Department and Shell to become aware of her claim. Mrs. Dartt asserts that the conciliation requirements of Section 626(d) were likewise fulfilled, because the Labor Department made an early initial attempt to see if her claim could be settled.

However, the record establishes that, when the Labor Department received her complaint and started processing it, the Labor Department investigator did not believe that such complaint constituted a Notice of Intent to Sue (A.

53-57, 65, 69).[1] In fact, he informed Shell that Mrs. Dartt had not filed any Notice of Intent to Sue (A. 50).

Although the Labor Department investigator testified that he made an initial attempt to see if the complaint could be resolved, and described this attempt as "conciliation" (A. 55), he did not describe what he had done nor did he explain whether this pre-investigative settlement attempt was comparable to his later conciliation efforts after he received the Section 626(d) notice from Mrs. Dartt. No inquiry was made in the District Court proceedings as to the extent of the initial settlement attempt, because Mrs. Dartt did not premise her claim upon that ground. Instead, she claimed that her mistaken reliance upon the Department of Labor to preserve her rights, coupled with early notice to Shell of her claim, constituted sufficient equitable grounds to toll Section 626(d). (A. 51, 52; Tr. 10, 73, 81, 84, 131).

On appeal, the Department of Labor appeared as *amicus curiae*, and sought to file a brief, containing an Affidavit of Warren Landis, in support of its argument that the conciliation requirements of Section 626(d) had been fulfilled by the initial settlement attempt made by Mr. Speer (A. 1; 76-80). Shell moved to strike that brief, on the grounds that it was untimely filed (A. 1). The Court of

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[1] References to the joint Appendix are designated as (A. (page)). References to the original transcript are designated as (Tr. (page)). References to the Tenth Circuit Reply Brief of Shell to the *Amicus* Brief by the Labor Department are designated as (Shell Resp. Bf. (page)).

Appeals denied that motion, but gave Shell leave to file a response (A. 1). Shell did so, again objecting to the Landis Affidavit on the grounds that it was untimely presented and contained hearsay, and offering in rebuttal the Affidavit of Ken Jacobs as to the facts surrounding the initial settlement attempt (Shell Resp. Bf., p. 2, 3).

The Jacobs Affidavit revealed that the initial "conciliation" consisted of a simple inquiry by Mr. Speer as to whether Shell was interested in exploring possible settlement of the Dartt complaint or whether Shell wished to respond to the complaint (A. 81, 82). Mr. Jacobs stated that he was not informed by Mr. Speer that any "conciliation" was occurring, and Mr. Jacobs believed that an ordinary investigation was in progress (A. 81).

Shell responded to the Speer inquiry by stating that it preferred to postpone any settlement discussions until after a full investigation, because it felt that such an investigation would vindicate its position that Mrs. Dartt had been properly terminated (A. 77, 82). There were no further contacts between Shell and the Labor Department for some three months, during which time Shell was preparing voluminous compilations for Mr. Speer concerning its personnel actions (A. 77, 82). The next contact was instituted by Shell, and consisted of a telephone conversation by Mr. Jacobs to Mr. Speer to inform Mr. Speer of the status of the compilations (A. 82).

After Mr. Speer received the Notice of Intent to Sue from Mrs. Dartt, he advised Shell of the Notice and of his

conciliation responsibilities under Section 626(d), and set up a conciliation meeting. (A. 78, 82). Mr. Jacobs described this meeting as follows:

> [M]r. Speer advised me that he was no longer acting as an investigator with respect to the charge, but was there solely as a "mediator." He stated that it made no difference to him as to who was right in the dispute, and that anything the parties could agree on was fine with him. (A. 82)

Mr. Jacobs compared the difference between the first "conciliation" meeting and the second meeting, as follows:

> In the October meeting, Speer had stated that any settlement of the case would need to be acceptable to the Department of Labor and to Ms. Dartt. In the meeting mentioned above, he appeared to be disinterested in how the case was settled. Furthermore, in the October, 1973 meeting, Mr. Speer merely offered Shell the opportunity to explore settlement of the charge, whereas, in the last meeting, Speer appeared to be actively interested in bringing the parties together without any control by Speer over the terms of the settlement. (A. 82, 83)

According to the Jacobs Affidavit, Mr. Speer continued to play an active role in the pursuit of possible settlement after this meeting. He ascertained the initial demands by Mrs. Dartt and communicated them to Shell. (A. 82, 83). He encouraged Shell to consider the proposal by Mrs. Dartt, and offered his assistance in presenting any Shell counter-proposal to Mrs. Dartt (A. 83).

Neither Mrs. Dartt nor the Labor Department objected to the introduction of the Jacobs Affidavit, nor did

either present any evidence in rebuttal of this supplementary evidence as to what had actually taken place during the first and second conciliation efforts mentioned by Mr. Speer. The Court of Appeals did not strike either the Landis or the Jacobs Affidavit. However, in adopting the new argument by the Department of Labor that the first conciliation attempt was adequate to satisfy the purposes of Section 626(d), the Court of Appeals neither discussed the undisputed contrary evidence proffered in the Jacobs Affidavit, nor did it remand for a further hearing as to the scope of the first conciliation attempt.

III. ARGUMENT AND AUTHORITIES

A.

This Court Should Reject The New Issue Raised By Mrs. Dartt As To The Effective Date Of Her Termination.

In her brief to this Court, Mrs. Dartt raises, for the first time, the argument that the 180-day period in Section 626(d) did not begin to run until December 31, 1973 (Resp. Bf. 17, 18). That date is the date through which Mrs. Dartt calculated that her lump sum severance payment (paid at her termination on July 31, 1973) would have compensated her (A. 48).

This issue is not properly before this Court, because Mrs. Dartt did not raise it before the district court, the Court of Appeals, or before this Court through a cross-petition for certiorari. Throughout the proceedings before the courts below, all parties acknowledged that the alleged

discrimination against Mrs. Dartt occurred on the date of her termination on July 31, 1973 (A. 4, 8, 11, 27, 40, 43-45, 76, 77). In fact, Mrs. Dartt testified that she believed that the 180-day period ran from the July 31, 1973 termination date, and that she believed that her Notice of Intent to Sue was out of time (A. 43-45).

By untimely seeking to present this issue, Mrs. Dartt has violated Rule 40 of the Supreme Court Rules. That Rule expressly prohibits a party from raising new questions in a brief on the merits. It is well-established that this Court will refuse to consider any additional attack upon a judgment below, where the question was neither raised nor litigated before the lower courts. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, at 191 (1937); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, at 330 (1967); *J. I. Case Co. v. Borak*, 377 U.S. 426, at 428-429 (1964); *De Sylva v. Ballentine*, 351 U.S. 570, at 582 (1956); *McCullough v. Kammerer Corp.*, 323 U.S. 327, at 380 (1945); *Helvering v. Minnesota Tea Co.*, 296 U.S. 378 (1935); *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441, at 446 (1976).

In the *Robbins & Myers* case, this Court expressly refused to accept a similar belated contention by a Title VII plaintiff as to the effective date of her termination, noting that none of the parties had previously raised such an issue and it was now too late to do so. Mrs. Dartt had proffered no reason for departure from these well-

settled principles, and this Court must find that the presentation of this new issue is foreclosed.

Moreover, assuming *arguendo* that the issue could be raised, it is clear that the 180-day period commenced to run on July 31, 1973, when Mrs. Dartt ceased performing any more work for Shell and was terminated. There is no argument that here, like in *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), Mrs. Dartt was confused as to the effective date of her termination because her last day of work and her last pay period did not coincide. Instead, Mrs. Dartt received her last paycheck and her notice of her termination on the same day, and testified that she considered July 31, 1973 to be her termination date.

Thus, Mrs. Dartt is in the identical position to the plaintiffs in *Electrical Workers v. Robbins & Myers, Inc.*, *supra*, and in *United Air Lines, Inc. v. Evans*, ___ U.S. ___, 97 S. Ct. 1885. The time limitation started to run on July 31, 1973, and expired 180 days thereafter, at which time the termination of Mrs. Dartt became "a past event which has no present legal significance." (97 S. Ct. at 1890).[2]

B.

The Mere Receipt And Processing By The Labor Department Of The Dartt Complaint Did Not Satisfy The Requirements Of Section 626(d)

[2] See also, *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975); *Doski v. M. Goldseker Co.*, _____ F. Supp. _____, 10 EPD ¶ 10,582 (D.C. Md. 1975).

In her brief, Mrs. Dartt argues that this Court should excuse her failure to timely file a Notice of Intent to Sue. This argument is premised on the exclusive grounds that her presentation of her oral complaint, and the subsequent processing of that complaint by the Labor Department, brings this action within the tolling principles enunciated by this Court in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965).[3]

According to Mrs. Dartt, this action falls within the *Burnett* tolling principles for two reasons. First, the fundamental notice and conciliation purposes of Section 626(d) were allegedly fulfilled when Shell and the Labor Department received early notice of her claim and when Shell was asked by the Labor Department if it wished to engage in settlement discussions. Secondly, because the fundamental purposes of Section 626(d) were allegedly fulfilled, this

[3] Mrs. Dartt did not proffer any argument nor did she seek to otherwise refute the contentions by Shell that the facts in this case did not warrant any tolling of the Section 626(d) time limitation on the recognized equitable grounds for tolling statutes of limitations due to misconduct by the defendant; legal disability of the plaintiff; or inability to take the required action due to operation of law. Mrs. Dartt does not appear to argue that she was excusably ignorant of the requirement, apparently accepting the holding by the Court of Appeals that the Department of Labor had no statutory duty to advise her of the requirement (A. 35). Likewise, she does not argue that she had insufficient knowledge of the A.D.E.A. to put her on inquiry as to Section 626(d). Instead, her argument is based solely upon the alleged lack of prejudice to Shell by the untimely filing of her Notice of Intent to Sue.

Court must give a liberal interpretation to the otherwise clear language of Section 626(d) in order to effectuate the humane and remedial purposes of the A.D.E.A.

As will be seen below, both the facts and the legislative history of Section 626 demonstrate conclusively that neither the notice nor conciliation purposes of Section 626(d) were fulfilled by the registering of the oral complaint or the initial settlement inquiry. As will also be shown, the adoption of the theory advanced by Mrs. Dartt would significantly disrupt the orderly administration of the A.D.E.A. and frustrate the Congressional purposes in enacting Section 626(d).

1. The Purposes of Section 626(d) Were Not Satisfied by Labor Department Processing of the Dartt Complaint.

Shell addressed at length in its principal brief the reasons why an oral complaint does not satisfy the notice requirements of Section 626(d), because such a complaint fails to notify either the employer or the Labor Department of the intention by the complainant to bring a private action. Shell argued that, without this triggering event, both the Department of Labor and the employer are deprived of the impetus to engage in the type of exhaustive conciliation which Congress deemed to be essential to effective enforcement of the A.D.E.A. As will be further discussed below, the facts in this case demonstrate that the oral complaint by Mrs. Dartt failed to trigger the type of

exhaustive conciliation contemplated by Section 626(d).

Section 626(d) provides that, upon receipt of a Notice of Intent to Sue, the Department of Labor must promptly notify the employer of this fact, and must promptly "seek to eliminate any alleged unlawful practice by informal methods of conference, conciliation and persuasion." This conciliation responsibility of the Department is virtually identical to the requirement of Section 626(b), which requires similar conciliation efforts before the Department institutes any suit of its own under the A.D.E.A.

The legislative history of Section 626 (which was Section 7 of the Act) reveals that Congress intended that the conciliation responsibilities of the Labor Department be quite stringent, and that the Labor Department exert every effort to prevent the filing of a lawsuit through its mediation efforts. As Representative Dent stated in his discussion of this provision of H.R. 13054:

> It is intended that the responsibility for enforcement, vested in the Secretary by section 7, be initially and exhaustively directed through informal methods of conciliation, conference and persuasion, and formal methods applied only in the ultimate sense.
>
> * * *
>
> In summary, section 7 of this bill:
>
> * * *
>
> Second. Directs the Secretary to attempt to secure voluntary compliance through conciliation, and requires 60 days' notice to the Secretary by persons intending to file civil actions to provide time for in-

formal methods to bring about compliance with the act.[4]

Although no reported cases have been found as to the extent of the conciliation responsibilities of the Labor Department under Section 626(d), the similarity of the language of Section 626(b) and the above-cited legislative history yield support for the argument that Sections 626(b) and (d) place virtually identical conciliation responsibilities upon the Labor Department. The principal case interpreting the duties of the Labor Department under Section 626(b) is *Brennan v. Ace Hardware Corporation*, 495 F.2d 368 (8th Cir. 1974).

In *Ace Hardware*, the Labor Department received oral complaints from two applicants concerning age discrimination. The Labor Department investigator met with the employer on two occasions to investigate the complaint, and thereafter telephoned the employer to notify it that the complaints appeared to have merit. The employer was apparently requested to settle the matter by hiring one of the complainants, but refused to do so, and the conversation ended. The employer was thereafter sued by the Department of Labor with respect to the complaints, but the action was dismissed for failure of the Department to engage in the type of exhaustive conciliation required by Section 626(b).

In affirming this dismissal, the Eighth Circuit found

[4] 113 Cong. Rec. 34748. See also identical language in H.R. Rep. No. 805, 90th Cong., 1st Sess. p. 5 (1967) and virtually identical language in S. Rep. No. 723, 90th Cong., 1st Sess. p. 5 (1967).

that the Department of Labor is required to employ "strong, affirmative attempts" to achieve compliance with the A.D.E.A. (495 F.2d at 374). This included informing the employer of the remedies available under the A.D.E.A; a warning that suit might be brought if no settlement is reached; notice to the employer of the demands which the plaintiff would make in such a suit; and notice to the employer that it could respond to these demands (495 F.2d at 375).

The facts in this case demonstrate that nothing at all comparable to these conciliation functions was performed by the Department of Labor during its initial pre-investigative settlement inquiry. Thus, Shell was not advised that any suit against it was contemplated by Mrs. Dartt, and, of course, Shell was not advised as to what demands Mrs. Dartt anticipated presenting in any such suit. There is no evidence that Shell was advised of the remedies available to a private plaintiff under the A.D.E.A.,[5] nor was Shell afforded a meaningful opportunity to make a counteroffer to Mrs. Dartt in light of this information.

Instead, both Shell and the Labor Department were led to believe that Mrs. Dartt did not intend to maintain a private action, as is demonstrated by the fact that the Labor Department informed Shell that Mrs. Dartt had not filed a Notice of Intent to Sue. Shell was further led to believe that no litigation against it was presently being

[5] i.e., reinstatement, backpay, liquidated damages, injunctive relief, and attorney fees.

contemplated, because the Department had not made any final determination that there was merit to the Dartt complaint. (A. 67) Likewise, Shell was led to believe that it could freely suspend any settlement discussions until after it had presented its side of the story in the investigation and the Department had reached a conclusion on the merits of the complaint.

As the preliminary processing of the Dartt complaint demonstrates, the Labor Department did not believe that it was under any stringent time limits in seeking resolution of the complaint, nor did the Department engage in exhaustive conciliation of the complaint. Rather, the Department did not make a single inquiry as to the interest of Shell in pursuing settlement during the 60-day period following its receipt of the oral complaint (A. 77). When the Department finally inquired as to Shell's interest in settlement some 80 days after the Dartt complaint was registered, it abandoned any further "conciliation" efforts when Shell advised the Department that it preferred to have an investigation before discussing settlement. (A. 77) To argue that this single, cursory inquiry constituted "strong affirmative attempts" to conciliate the Dartt complaint is nonsense.

It is apparent that the oral complaint by Mrs. Dartt wholly failed to trigger the type of exhaustive conciliation contemplated by Section 626(d).[6] Thus, because the oral

[6] Shell believes that the undisputed facts in the record adequately establish that the initial settlement inquiry failed to meet the conciliation standards of Section 626(d). However, assuming *arguendo* that

(Continued next page)

complaint failed to convey the requisite notice to activate the exhaustive conciliation required by Section 626(d), the *Burnett* tolling principle is inapplicable. That principle allows tolling of a statute of limitations only where alternative actions by a plaintiff fulfill the basic purposes of the statute. Such clearly did not take place here, even assuming *arguendo* that the time limitation of Section 626(d) is analogous to a statute of limitations and subject to the same tolling principles.

2. Allowance of Tolling Would Unduly Complicate Administration of the A.D.E.A.

As was previously discussed, Congress established the 180-day limitation period for filing a Notice of Intent to Sue in order to provide employers and the Department of Labor with speedy notice of possible private litigation. Such notice is essential to effective conciliation, both because the threat of impending litigation provides employers with significant added impetus to settle the claim while it is still small, and because the statute charges the Department of Labor with making immediate, concerted efforts to bring the parties together. To allow tolling of the time

(Footnote Continued)

there was insufficient evidence adduced on that issue and such issue has relevance to a final determination of this action, this Court may properly order this action remanded for further hearing. See, e.g., *Helvering v. Gowran*, 302 U.S. 238, at 246-247 (1937), wherein this Court ordered a remand where the case was decided on a different theory than that litigated below. See also, *Malat v. Riddell*, 383 U.S. 569, at 572 (1966); *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).

for meeting the requirement would negate the principal purposes for the requirement.

This Court must not overlook the fact that the rule of law which it adopts in this case will be applied to all employers, large and small. The A.D.E.A. covers all employers with 20 or more employees. It must be remembered that a business with only twenty employees ordinarily has a limited budget for litigation expenses, and may ill afford the impact of substantial sums for backpay, liquidated damages and attorney fees for the opposing side. If given an early notice of an impending lawsuit and an explanation of the consequences if such litigation is successful, such small businesses (which make up a significant sector of American business) may seriously consider conciliation as a welcome alternative to suit.

When notice of an impending suit is not given within 180 days of the alleged violation, these small businesses will suffer significant harm. Backpay (for which the small employer will receive no productive work) may have risen to a large enough amount that the employer has no alternative but to litigate the matter. On the other hand, where an early notice of suit is given, and backpay is still small, the small business may well find that the anticipated costs of litigation so far exceed the price of settlement that conciliation is the best course.

The inherent weakness in the tolling allowed by the Court of Appeals for oral complaints is that it will promote

endless litigation as to when a complainant must register an oral complaint; what actions the Labor Department must take on the complaint; how soon a Section 626(d) notice must be filed after the oral complaint is registered; and so forth *ad infinitum*. For example, another complainant could go to an equally busy Labor Department office some 160 days after his discharge, and be treated in the same manner as Mrs. Dartt. In such a case, that complainant might not learn of the Notice of Intent to Sue requirement until a year after his discharge. Then, if the 180-day period was allowed to be indefinitely tolled by the oral complaint, this complainant could conceivably wait another year or more before finally filing a Notice of Intent to Sue.

Moreover, it might well occur that the particular Labor Department office might take an even longer time to notify the complainant of the Notice requirement. Thus, using the above example, it is not inconceivable that the Labor Department might never notify the complainant of the Notice requirement, because the 180-day period would have run before the Department started serious processing of the charge and notification would seem unnecessary. Would this failure to inform the complainant of the requirement act to preserve the private right of action indefinitely? Furthermore, what effect would this tolling have on the Section 255 statute of limitations?

If the 180-day time limit may be extended for oral complaints, what treatment should be accorded to other

plaintiffs who miss the time limit? If the employee takes his age discrimination claim directly to his employer within the 180-day period, either through grievance proceeding or through a simple complaint to higher company officials, arguments could also be made for application of tolling principles. What treatment should be accorded to persons who utilize these internal procedures, and file a Notice of Intent to Sue on the 181st day or the 190th day? These persons would have filed their Notice prior to the time that Mrs. Dartt filed her Notice in the instant action. Will this "slight delay" also be excusable? If it is not, then similarly-situated plaintiffs and defendants will be subject to wholly different time limits for filing the required Notice, based simply on whether a complaint was lodged with the Department of Labor.

If the registering of that oral complaint is the key to tolling, the next logical question is whether such tolling can be applied where the Labor Department took different actions with respect to the oral complaint than were taken with respect to Mrs. Dartt's complaint. What if the complaint is registered on the 180th day, but the Labor Department is so busy that the employer is not notified of the complaint until six months after the complaint is registered? What if the Labor Department receives a complaint on the 160th day and notifies the employer promptly, but never inquires as to whether the employer is interested in settlement? Will tolling be dependent on settlement overtures, and, if so, how extensive must those overtures be?

If the complaint is investigated and found lacking in merit, are settlement overtures necessary?

These questions are by no means frivolous. Many of them have already arisen in connection with litigation on the interpretation of Section 626(d). The list of questions is not at all exhaustive, but it serves to point out the problems which the courts will face if forced to make a case-by-case determination as to whether the particular facts would warrant equitable tolling. Instead of an easily-applied 180-day time period, the federal courts would be faced, in essence, with recurring questions of laches.

Shell submits that the strong public policy in favor of speedy resolution of A.D.E.A. complaints will be hindered, rather than furthered, by the application of the doctrine of tolling to the 180-day requirement. Employers, complainants and the Labor Department will be hopelessly confused as to the circumstances under which a private right of action is preserved.

There is nothing inherently unfair in strictly applying the 180-day limitation. Complainants have an ample period of time to discover what is necessary to preserve their rights to maintain a private action and to file a Notice of Intent to Sue with the Department of Labor.[7] Moreover, as A.D.E.A. complainants may resort to administrative relief through the Labor Department even after the 180-

[7] Notably, complainants have 180 days to file charges with E.E.O.C. under Title VII, and apparently meet this requirement with little difficulty.

day period has elapsed, they suffer less harm by a strict application of the 180-day time limits than do Title VII complainants, who are completely barred from relief where timely compliance with the Title VII charging requirement is not met.

A strict application of the time limit will also insure that employers receive prompt notice of an impending lawsuit, and will afford such employers the requisite certainty as to potential liabilities if the claim is not settled, thereby promoting settlement. Likewise, the Department of Labor will have definite knowledge of the claims to which it must devote speedy and vigorous conciliation efforts.

Mrs. Dartt argues that enforcement of the express terms of Section 626(d) is inappropriate, because too many A.D.E.A. actions are being dismissed because of lack of timely compliance with that Section. This argument is clearly addressed to the wrong branch of government. In truth, it begs the question, because the necessary and expected result of a short time limitation is that the number of private actions will be circumscribed. That the statistics seem to bear out this expected result is not surprising, and Congress remains free to alter or abolish Section 626(d) if it finds its operation to be overly harsh.[8]

In summary, this Court must refuse to allow tolling of the 180-day period for persons who register oral complaints with the Labor Department, or who take other

[8] Indeed, as will be seen, a Bili has been passed by the Senate to eliminate the 180-day requirement.

alternative actions which do not fulfill the Notice of Intent to Sue requirement.[9] No legitimate public policy arguments exist for tolling the requirement, because strict application of the time limit gives full effect to the language of the statute; prevents possible prejudice to the employer and Labor Department due to the untimely notice; and leaves the complainant with an adequate remedy expressly approved by Congress.

3. Application of a Tolling Principle to Section 626(d) Would Infringe Upon Congressional Prerogatives.

Recent actions by the Congress with respect to proposed amendments to the A.D.E.A. support the argument by Shell that any modification of Section 626(d) should properly be made by Congress. These actions also support the argument by Shell that Congress has not yet provided that A.D.E.A. time limitations may be tolled during the period in which the Labor Department is processing a complaint.

On March 24, 1977, Secretary of Labor Marshall testified before a House Subcommittee in favor of two procedural amendments to the A.D.E.A., as well as other

[9] See footnote 30, principal Brief of Shell, together with the following recently decided cases holding that Section 626(d) is a jurisdictional prerequisite to suit: *Charlier v. S. C. Johnson & Son, Inc.*, _____, F.2d _____, 15 FEP Cases 421 (5th Cir. 1977); *Platt v. Burroughs Corp.*, 424 F. Supp. 1329 (E.D. Pa. 1976); *Black v. Hunter Packing Co.*, 427 F. Supp. 152 (E.D. Ill. 1977); *Montgomery v. Obear-Nester Glass Co.*, ____ F. Supp. _____, 15 FEP Cases 614 (E.D. Ill. 1977); *Davis v. RJR Foods, Inc.*, 420 F. Supp. 930, (S.D. N.Y. 1976).

matters not pertinent here. The first amendment sought by Secretary Marshall was a provision which allowed tolling of the A.D.E.A. statute of limitations period during conciliation efforts by the Department of Labor. Mr. Marshall stated that such an amendment was needed, because:

> The difficulty we face, however, is that the conciliation process does not toll the operation of the statute of limitations as it does in Title VII of the Civil Rights Act.[10]

The second amendment sought by Secretary Marshall was deletion of the Notice of Intent to Sue requirement. Secretary Marshall noted that a number of courts had held this requirement to be a jurisdictional prerequisite to suit, and stated:

> Although this issue is now before the Supreme Court, it is our view that an amendment deleting the notice requirement would materially advance the purposes of the ADEA . . . .[11]

Subsequent to the testimony by Secretary of Labor Marshall, the full House took up consideration of H.R. 5383, which contained certain amendments to the A.D.E.A. Significantly, this Bill was reported to the full House by the Committee on Education and Labor without either of

[10] See Appendix A, hereto, containing the pertinent provisions of his remarks, at p. 30. Assistant Secretary of Labor Elisburg gave identical testimony to a Senate Subcommittee on July 26, 1977. See Appendix B, hereto, at p. 31.

[11] Appendix A, at p. 30, 31. See identical remarks by Assistant Secretary Elisburg, Appendix B, at p. 32.

the amendments proposed by Secretary Marshall.[12] Section 7(d) was specifically set forth in the House Report, and left unchanged.[13] In the debate before the full House, no effort was made to present the amendments proposed by Secretary Marshall, and the Bill was passed leaving Section 7(d) intact.[14]

Subsequent to the passage of H.R. 5383, that Bill was sent to the Senate for its consideration. On October 11, 1977, the Senate Human Resources Committee reported out H.R. 5383 with a number of amendments.[15] These amendments included modified versions of the two amendments sought by Secretary Marshall and Assistant Secretary Elisburg.

The Senate Committee version of H.R. 5383 altered the Notice of Intent to Sue requirement by deleting the 180-day time limit.[16] It is apparent that the Committee felt that it was making an important, substantive change, because the Report speaks in terms of the Notice of Intent to Sue requirement being abolished, stating:

> Section 7(d) of the act requires that an individual must give the Department of labor notice of intent to file suit within 180 days after the alleged unlawful practice occurs. . . . Subsection (a) of Section 4 eliminates . . . these requirements.

[12] H. Rep. No. 95-527, 95th Cong., 1st Sess. p. 16-25 (June 25, 1977).

[13] H. Rep. No. 95-527, *supra*, at p. 20.

[14] 123 Cong. Rec. H 9967-9985 (Sept. 23, 1977)

[15] S. Rep. No. 95-493, 95th Cong., 1st Sess. (October 12, 1977).

[16] S. Rep. No. 95-493, *supra*, at p. 25. See Appendix C for the text of such modification.

Subsection (b) provides that the elimination of the notice of intent to sue requirement shall take effect with respect to civil actions brought after the date of enactment.[17]

With respect to the tolling amendment sought by Secretary Marshall, the Senate Committee version of H.R. 5383 adopted a provision which allowed tolling of the Section 255 statute of limitations only during the time that the Department of Labor is engaged in conciliation pursuant to Section 626(b).[18] Notaby, there was no provision for comparable tolling while the Department of Labor was engaged in conciliation pursuant to its receipt of a Section 626(d) Notice of Intent to Sue.

The full Senate passed the Senate Committee version of H.R. 5383 on October 19, 1977.[19] Before passage of the amendment deleting the 180-day requirement, Senator Church (who sponsored the amendment) stated that the effect of the deletion would be "to extend from 180 days to 22 months the notice of intent to sue requirement for em-

[17] S. Rep. No. 95-493, *supra*, at p. 20, 21. See also page 12, wherein the Report states that the Committee is "removing the 180-day notice requirement entirely." However, the 180-day limit was retained for suits by Federal employees. S. Rep. No. 95-493, at p. 30.

[18] S. Rep. No. 95-493, *supra*, at p. 25. See also pp. 13 and 21 of that Report. The text of the proposed amendments is set forth in Appendix D.

[19] 123 Cong. Rec. S17272-17304 (1977). Some minor changes were made which, with one exception later discussed, were not pertinent here. See Appendix E for the text of Sections 7(d) and (e) (29 U.S.C. S626(d), (e)), as passed by the Senate.

ployees."[20] Senator Church stated that the reason for this change was to allow employees more time to learn of the requirement and to decide whether to file suit.[21]

The Senate also passed the tolling provision, allowing tolling of the statute of limitations during conciliation efforts by the Labor Department pursuant to Section 626(b), but limited that tolling to a maximum of two years.[22] The stated reason for circumscribing this tolling was that "unlimited tolling . . . during which time the employer continues to be liable for additional backpay damages" would constitute "an undue burden on the business community."[23] The Senate and House Bills are now scheduled to go to a Joint House-Senate conference Committee for resolution.[24]

From the above legislative developments, it is apparent that the Senate considered the 180-day time limit for filing a Notice of Intent to Sue to be an integral part of the requirement itself.[25] In deleting the 180-day period,

[20] 123 Cong. Rec. S17278 (1977). Senator Church apparently used the 22 month example because a 2 year (i.e., 24 month) statute of limitations applies to most A.D.E.A. actions. The sixty-day notice requirement would not toll this limitation period, which would result in notice having to be filed about two months prior to the running of the statute of limitations.

[21] 123 Cong. Rec. S17278 (1977).

[22] 123 Cong. Rec. S17295, 17296.

[23] 123 Cong. Rec. S17296.

[24] 123 Cong. Rec. S17304

[25] But see remarks by Senator Williams, 123 Cong. Rec. S17275 (1977).

the Senate Report speaks in terms of having eliminated the Notice of Intent to Sue requirement altogether, even though the Senate Bill would still require a private party to notify the Department of Labor before bringing suit. Moreover, the House continued to adhere to the present Section 626(d) requirement, in the face of overwhelming precedent construing timely compliance therewith as being a "jurisdictional prerequisite," to suit. These two factors militate strongly in favor of the conclusion that the 180-day limit of Section 626(d) is an integral part of the right to maintain any suit whatsoever, which must be strictly enforced.

This conclusion is further buttressed by the actions taken by the Senate with respect to tolling. As was discussed above, the Senate clearly believed that it was plowing new ground when it enacted a limited provision for tolling of the Section 255 statute of limitations only during conciliation activities by the Labor Department pursuant to Section 626(b). Thus, it may be concluded that the Senate believed that no tolling of A.D.E.A. time limits is permitted under the existing statute.

This provision of the Senate Bill becomes important if one accepts the argument by Mrs. Dartt that the 180-day requirement is simply another, shorter statute of limitations. Both the Secretary and Assistant Secretary of Labor testified that the A.D.E.A. statute of limitations is not tolled, under existing law, by the processing of a complaint by the Department. Therefore, if the 180-day time

limit is construed in the same manner as the Section 255 statute of limitations, it is clear that Mrs. Dartt would not be entitled to any tolling of the 180-day period by virtue of the actions by the Department on her behalf.

In summary, the above legislative developments reinforce the argument by Shell that Congress intended to retain the exclusive prerogative of deciding what, if any, modifications should be made in Section 626(d). Until Congress finally decides to either alter or abolish the provisions of Section 626(d), it is incumbent upon this Court to enforce that statute according to its express terms. Because the decision of the Court of Appeals failed to do so, this Court must reverse.

C.

Contrary To The Assertion By Mrs. Dartt, The District Court Considered Equitable Factors In Reaching Its Decision.

In her brief, Mrs. Dartt argues that the District Court strictly construed Section 626(d) to be a jurisdictional prerequisite, which could not be modified or tolled on equitable grounds (Dartt Bf. p. 3, 8, 9). However, this is clearly not the case.

As the opinion of the District Court reveals, that Court considered the 180-day time limit contained in Section 626(d) to be analogous to a statute of limitations, and noted that "the same principles should apply" (A. 19). The District Court made an exhaustive analysis of the

equitable arguments advanced by Mrs. Dartt, and concluded Mrs. Dartt "did not take any action which would justify the tolling of a statute of limitations in a parallel situation." (A. 23).

On appeal, Shell properly advanced in support of the judgment its argument (which was rejected by the lower court) that timely compliance with Section 626(d) was a mandatory jurisdictional prerequisite which could not be modified on equitable grounds. See, e.g., *Lagnes v. Green*, 282 U.S. 531 (1931). Perhaps due to the vigorous presentation by Shell of this argument, the Court of Appeals misconstrued the decision by the District Court as having held that failure to timely comply with Section 626(d) was "an absolute bar" to a private A.D.E.A. action (A. 29, 30). The Court of Appeals then analyzed the equitable arguments advanced by Mrs. Dartt, and construed the relative equities differently (A. 33-36).

As was noted in the principal brief of Shell, this preemption of the discretionary equitable powers of the District Court, vested in that Court by virtue of Section 626(b), was clearly erroneous. The Court of Appeals did not hold that the District Court abused its discretion. Instead, the Court of Appeals, apparently believing that the District Court had failed to exercise its discretionary powers, improperly engaged in a *de novo* review of the record in order to determine the equities in the case.

It is clear that the Court of Appeals erred both in its apparent finding that the District Court had failed to

exercise its discretion and in engaging in a *de novo* review of the record. *Burns v. U.S.*, 287 U.S. 216 (1932); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).[26] As a resut, its decision must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals must be reversed, and this action ordered dismissed.

Respectfully submitted,

Mary T. Matthies
KOTHE, NICHOLS & WOLFE, INC.
124 East Fourth Street
Tulsa, Oklahoma 74103

Attorneys for Shell Oil Company

Of Counsel:
Brynn F. Aurelius
P.O. Box 2463
Houston, Texas 77001

[26] Mrs. Dartt did not respond to this argument by Shell, apparently because of her assertion that the District Court simply refused to exercise its discretion. However, assuming *arguendo* that the District Court did, in fact, fail to exercise its discretion, it is well-established that the proper course which should have been followed by the Court of Appeals was to lay down the proper standards for exercise of that discretion and remand to the District Court for reconsideration of its holding in light of these new standards. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

APPENDIX A

Extract of Remarks by Secretary of Labor Marshall to House Labor Subcommittee On Labor Standards, March 24, 1977. (Taken from BNA Daily Labor Report, Volume 58, p. E-2 (March 24, 1977))

> Although ADEA is a separate statute, it incorporates the enforcement machinery of the Fair Labor Standards Act. In addition to this machinery, the ADEA provides that the Department will attempt to achieve voluntary compliance (through the conciliation process) before instituting suit. Such suits are subject to the same statute of limitations applicable to suits brought under the Fair Labor Standards Act. The difficulty we face, however, is that the conciliation process does not toll the operation of the statute of limitations as it does in Title VII of the Civil Rights Act. The result is that employers have no incentive to engage in prompt or serious conciliation. Every day in conciliation means a diminution in any relief which the employer may ultimately be required to provide. I think it clear that the conciliation process would be greatly enhanced if the Act were amended to provide, as you did in Title VII, for the tolling of the statute of limitation during the conciliation process.
>
> A second issue concerns the notice of intent to sue which an employee must file with the Secretary prior to instituting court action. The ADEA, although providing for a two and three-year statute of limitations, contemplates that this notice will be filed within 180 days of the asserted violation. A number of courts have construed this notice requirement as a jurisdictional prerequisite to suit. This interpretation has frustrated achievement of the purposes of the ADEA in a significant number of cases. Although this issue is now before the Supreme Court, it is our view that

> an amendment deleting the notice requirement would materially advance the purposes of the ADEA and would refocus litigation from procedural matters to the substantive merits of each case.

APPENDIX B

Extract of Remarks by Assistant Secretary of Labor Elisburg to Senate Human Resources Subcommittee On Labor, July 26, 1977. (Taken from BNA Daily Labor Report, Volume 144, p. E-2 (July 26, 1977)).

> Before concluding, I would like to suggest consideration of two further changes in the ADEA. Secretary Marshall made these recommendations when he testified on the minimum wage before the House Subcommittee on Labor Standards last March.
>
> Although ADEA is a separate statute, it incorporates the enforcement machinery of the Fair Labor Standards Act. In addition to this machinery, the ADEA provides that the Department will attempt to achieve voluntary compliance (through the conciliation process) before instituting suit. Such suits are subject to the same statute of limitations applicable to suits brought under the Fair Labor Standards Act. The difficulty we face, however, is that the conciliation process does not toll the operation of the statute of limitations as it does in title VII of the Civil Rights Act. The result is that employers have no incentive to engage in prompt or serious conciliation. Every day in conciliation means a diminution in any relief which the employer may ultimately be required to provide. I think it clear that the conciliation process would be greatly enhanced if the Act were amended to provide, as you did in title VII, for the tolling of the statute of limitations during the conciliation process.

A second issue arises because of procedural time limits imposed in private suits which are not imposed on suits brought by the Secretary. This problem concerns the filing of notice of intent to sue which an employee must file with the Secretary prior to instituting a private court action. The ADEA, although providing for a two- and three-year statute of limitations, contemplates that this notice will be filed within 180 days of the asserted violation. A number of courts have construed this notice requirement as a jurisdictional prerequisite to suit. This interpretation has frustrated achievement of the purposes of the ADEA in a significant number of cases. Although this issue is now before the Supreme Court, it is our view that an amendment deleting the notice requirement would materially advance the purposes of the ADEA and would refocus litigation from procedural matters to the substantive merits of each case.

APPENDIX C

Text of proposed modification to Section 7(d) of the A.D.E.A. (29 U.S.C. § 626(d), as reported out by Senate Human Resources Committee. As per Senate rules, language proposed to be deleted is bracketed, and new language is italicized.

> [(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed — (1) within one hundred and eighty days after the alleged unlawful practice occurred, or (2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. Upon receiving

> a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.]
>
> *(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.*

Apparently through inadvertent error, the Senate Report does not set forth the effective date of this proposed amendment, although it seems clear that the Committee intended to adopt Section 4(b) of the amendment introduced by Senator Williams (see pp. 16, 17, 21 of the Report), which provided that the new Section 7(d) *"shall take effect with respect to civil actions brought after the date of this Act."* See 123 Cong. Rec. S17272 (1977).

APPENDIX D

Text of proposed amendment of Section 7(e) of the A.D.E.A. (29 U.S.C. § 626(e)), as reported out by Senate Human Resources Committee. As per Senate rules, language proposed to be deleted is bracketed, and new language is italicized.

> [(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.]
>
> *(e) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference and persuasion pursuant to*

subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled.

Apparently through inadvertent error, the Senate Report does not set forth the effective date of this proposed amendment. However, it seems clear that the Committee intended to adopt Section 5(b) of the amendment proposed by Senator Williams (see p. 16, 17, 21 of the Report), which provided that the above amendment "*will take effect with respect to conciliations commenced after the date of enactment of this Act.*" See 123 Cong. Rec. S17272.

Prior to passage by the Senate, a technical amendment was adopted reinstating former Section (e), redesignating it as subsection (1), and renumbering the amendment as subsection (2). See 123 Cong. Rec. S17278.

APPENDIX E

Text of amendments to Sections 7(d) and 7(e), as passed by the Senate. (123 Cong. Rec. S17272-17304.)

SEC. 4. (a) Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended to read as follows:

"(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

(b) The amendment made by subsection (a) of this section shall take effect with respect to civil actions brought after the date of enactment of this Act.

SEC. 5 (a) Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)), is amended by inserting (1) after the subsection designation and by adding at the end thereof the following:

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through conciliation, conference and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled, but in no event for a period in excess of two years.

(b) The amendment made by subsection (a) of this section will take effect with respect to conciliations commenced after the date of enactment of this Act.